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In the Supreme Court of the United States

CASE NO. 74-1405

MELVYN GREENSPAHN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MIAMI REVIEW — 371-4853 — 377-3721

in the
Supreme Court
of the
United States

CASE NO. _____

MELVYN GREENSPAHN,

Petitioner,

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The Petitioner, MELVYN GREENSPAHN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 11, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Florida.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on March 11, 1975. A timely Petition for Rehearing was denied on April 9, 1975, and this Petition for Certiorari was filed within 30 days of that date. This court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the conduct of Petitioner as a matter of law amounted to a "wilful" failure to file a tax return within the meaning of the statute.

STATUTORY PROVISION INVOLVED

United States Code, Title 26:

"§7203. Willful Failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016),

keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than 1 year, or both, together with the costs of prosecution. August 16, 1954, c. 736, 68A Stat. 851."

STATEMENT OF THE CASE

A four count information was filed against Petitioner on December 12, 1973, charging him with violating 26 U.S.C., Section 7203 by failing to file income tax returns for the years 1968, 1969, 1970 and 1971. The cause came on for trial on August 27, 1974, before Judge Peter Fay sitting without a jury. The record is replete with evidence which shows negligent handling of taxpayers returns and accounts. An employee of the Internal Revenue Service testified that a taxpayer living in Miami, Florida, has the option of filing his return in Miami, Jacksonville, Florida, or Chamblee, Georgia. If the taxpayer filed his return at the Internal Revenue Service office in Miami or Jacksonville, no record is made of it being received at the office, but rather they are then bundled up and sent to the Service Center in Chamblee, Georgia. The Service Center at Chamblee processes over 6,000,000 returns per year and there was evidence of a 5 month delay in processing returns.

In approximately 1966, Petitioner was notified by the I.R.S. that he had failed to pay under a household return

for a domestic employee. Knowing full well that he had paid, Petitioner, none-the-less, paid a second time, only to have his money refunded when the I.R.S. eventually "found" his earlier payment. Similarly, the investigation file in connection with securing the returns here in question was mysteriously "lost" and was not available to the agents testifying in the proceeding below.

Of course, Petitioner's record keeping was far from exemplary. When the I.R.S. could not find any of Petitioner's returns for the years 1968, 1969, 1970 and 1971, they requested Petitioner to furnish copies of the returns. Petitioner stated that he had filed his returns for those years, but that he was not certain where the copies were in that some of his tax records were in the trunk of his car; some of them were in his old apartment; some were in his new apartment; and some were at his accountants office. In fact, on April 23, 1973, an I.R.S. agent accompanied by Petitioner, searched the trunk of Petitioner's car for copies of his returns for the years in question. The agent testified as follows:

"Q. Did you go to the trunk of his car with him?
A. Yes, I did.

Q. Did he open it up for you?
A. Yes, he did.

Q. Would you tell His Honor about the filing system there?
A. I don't think you could call it a filing system. He had several records strewen all over the trunk of his car, some in cartons, some loose checks and other various financial papers, I would assume.

Q. You would assume or you actually looked at them?
A. I glanced through them for income tax returns, only for copies of returns. I didn't recall what the other documents were. If I didn't see an income tax return, I just passed on.

Q. But you recognized it as being financial documents?
A. I would assume so, since he had checks there too.

Q. Now, you did find some income tax returns in the trunk of the car, didn't you?
A. Yes, I did.

Q. For what years?
A. I found actually what appeared to be copies of 1958, 1960 and 1965 income tax returns.

Q. Did you also find correspondence in the trunk of the car regarding his 1967 return?
A. No, I believe Mr. Greenspahn found that.

Q. In the trunk of the car?
A. Yes.

Q. What were you all doing? Were you just out there rummaging through the papers and boxes there?
A. At that time, the two of us were trying to find actually copies of the copies that he said he had filed for the years 68 through 71.

Q. And it was that afternoon, was it not, sir, on the same day that Mr. Greenspahn called you?
A. Yes.

Q. And you said he had located a copy of his 69 return? Is that right?
A. Yes, that same afternoon."

Petitioner's accountant testified that in preparation of Petitioner's 1972 return, he felt it would be beneficial to average income and in connection with this income averaging the accountant needed Petitioner's previous income tax returns. Petitioner explained to his accountant that his records were in disarray and authorized his accountant to secure copies of his returns filed with the I.R.S. for the years 1968, 1969, 1970 and 1971. Subsequently, Petitioner's accountant was informed that the Service Center at Chamblee, Georgia, was "not able to locate" returns for the years requested.

Petitioner has consistently maintained that he has filed the returns for the years in question and specifically testified that he filed the 1968 return personally in Miami and that he mailed the other three returns.

In closing argument to the Court, the attorney for Respondent argued as follows:

"The law, as I understand it, requires that in the case of failure to file, there must be a purpose to disregard the law. There doesn't need to be an underlying motive or evil intent over and above the purpose to disregard the law."

The trial judge agreed with this interpretation of willfulness as evidenced by his following statements:

THE COURT:

". . I think our standard charge is with bad purpose to obey or disregard the law.

MR. ROSEN:

"Bad purpose or evil intent.

THE COURT:

"They [standard jury instructions] use evil intent here. I do not think I have used evil intent. I think I use with bad purpose.

MR. ROSEN:

"The trouble is, though, the bad purpose, I submit, means an intent to defraud or to cheat, and I think that's pointed out in the case of (140) United States versus McCorkle.

THE COURT:

"If you have a bad purpose to either disobey or disregard the law, you obviously intend to cheat, which is what you said at the outset. Yes, I would agree with you. It is an intent to do something you know you should not do or you intend to fail to do something deliberately that you know you are supposed to do, with the intent to cheat or not to follow the law.

MR. ROSEN:

"Isn't that right?

"No. I think in tax cases it means a little more —intent to cheat the Government."

Applying this standard, Petitioner was found guilty on all four counts and that judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit.

REASON FOR GRANTING THE WRIT

The record is totally devoid of any evidence that Petitioner "willfully" failed to file his income tax returns for the years 1968, 1969, 1970 and 1971. On the contrary, the record clearly shows that the Internal Revenue Service was negligent in the processing of its returns and collection of monies due under said returns. No records are kept in the office in which the returns are filed and no one knows what happens to the returns once they are received at the Service Center and some five (5) months later when they are processed.

The I.R.S. employees testified as to the normal course of business in processing and recording taxpayers returns and that the I.R.S. employees could not find Petitioners records. That is the *only* evidence that Petitioner committed a crime. The Internal Revenue Service reliance upon the perfection of their record keeping is commendable. But it defies logic and the human experience. There is no American who has not felt the effects of a computer error. Every American knows of instances where it has taken months and sometimes years to get out of the com-

puter maze and establish that indeed a mistake has been made.

The mere uncorroborated fact that the computer could find no record of Petitioner having filed a return *cannot* be basis of a criminal conviction and incarceration. Particularly when the I.R.S. employees admit to loosing an earlier payment of Petitioners and the investigative file in this very case.

Likewise, the Respondent failed to prove willfulness upon the part of Petitioner. There is no evidence that Petitioner was possessed of any bad purpose or evil motive in failing to file, *United States v. Bishop*, 93 S.Ct. 2008 (1973).

Admittedly, Petitioner's financial records were in a state of disarray. However, this Court in *Murdoch v. United States*, 54 S.Ct. 226 (1933), held that:

> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct."

Petitioner's records in the instant case were in the trunk of his car and various other locations. But this alone is not sufficient to prove willfulness nor should the burden be on Petitioner to produce records which show that the records of the Internal Revenue Service are

erroneous. We have not yet reached the stage in our criminal justice system where a person can be found guilty of a crime, because his personal record keeping is insufficient to prove error on the part of government records.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

LAW OFFICE OF
SAM SPECTOR, P.A.
Post Office Box 82
Tallahassee, Florida 32303
Attorney for Petitioner

By: /s/ Sam Spector

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari has been furnished to ROBERT W. RUST, United States Attorney, 300 Ainsley Building, Miami, Florida, 33132, and DAVID E. ROSEN, 310 Biscayne Building, Miami, Florida, 33132, by U.S. Mail, postage prepaid, this 7th day of May, 1975.

/s/ Sam Spector
Attorney

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-3663
Summary Calendar

D. C. Docket No. 74-351-CR-PF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MELVYN GREENSPAHN,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 11, 1975

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3663
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

MELVYN GREENSPAHN,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(March 11, 1975)

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM: Melvyn Greenspahn appeals from his conviction on four counts of wilful failure to file income

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

tax returns for the years 1968-1971, in violation of 26 U.S.C. §7203. His sole contention on appeal concerns the sufficiency of the evidence to support his conviction. We affirm.

A review of the record shows that the government put on strong evidence, albeit circumstantial, from which the fact-finder could reasonably conclude that the evidence is inconsistent with the hypothesis of Greenspahn's innocence. United States v. Warner, 5 Cir., 1971, 441 F.2d 821, 825.

We find it difficult to conclude that the Internal Revenue Service simply lost, as Greenspahn contends, his tax returns for all the years in question. Furthermore, the Internal Revenue Service records, while showing that Greenspahn did file and make payments on his 1967 return, do not indicate that any other payments were ever made. Greenspahn, while contending he did file his returns, was unable to produce any records of cash disbursements to the Internal Revenue Service except those in 1967 or any copies of the returns except an incomplete 1969 return. Although Greenspahn's protestations of innocence are plausible, it is the fact-finder's province to resolve factual disputes and the credibility of witnesses. The court, sitting without a jury, disbelieved Greenspahn. We decline to upset that finding where the evidence is sufficient to support a showing of wilful failure to file tax returns.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

April 9, 1975

TO ALL COUNSEL OF RECORD

Re: No: 74-3663 — U. S. A. Vs. Melvyn Greenspan

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/ Clare F. Sachs
Deputy Clerk

cc: Mr. E. David Rosen
Mr. Sam Spector
Mr. Robert W. Rust
Ms. Marshal L. Lyons

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-1405

MELVYN GREENSPAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on four counts of willful failure to file income tax returns for the years 1968, 1969, 1970, and 1971, in violation of 26 U.S.C. 7203. Petitioner was sentenced to 90 days' imprisonment on one count and the court withheld imposition of sentence on the other three counts, for which it placed petitioner on probation for three years. The court of appeals affirmed *per curiam* (Pet. App. 2-3).

Petitioner seeks review of the question whether the record supports the trial court's finding that he willfully failed to file the income tax returns.

The parties stipulated in the trial court that petitioner was a person required to file income tax returns in the prosecution years (R. 58).[1] Petitioner stated to Special Agent Larry Plave that he had practiced law since 1956 and understood his duty to file returns (R. 81-82). However, a representative of the Internal Revenue Service testified that although he had made a search for petitioner's tax returns, there was no record of petitioner's having filed income tax returns for the prosecution years (R. 30-39). Although petitioner maintained that he had filed the returns in question by mailing the returns for 1969, 1970, and 1971, and by giving the 1968 return to Revenue Officer Kasper (R. 118-119), Kasper denied receiving the 1968 return (R. 65, 70, 75). Petitioner could not supply the Internal Revenue Service with any retained copies of the returns he said he had filed, and admitted, in conversation with Special Agent Larry Plave, that he had no defense to offer to the charge of failure to file (R. 87).

Thus, the question presented to the trial court was one of credibility. On the one hand, petitioner claimed that he had filed the returns and, on the other hand, the government had, as the court of appeals stated (Pet. App. 3), "put on strong evidence, albeit circumstantial" that petitioner had not filed the tax returns. After consideration of the entire record, the trial court chose to believe the government's evidence and reject petitioner's testimony. Because the trial court's finding is amply supported by the record, further review by this Court is not warranted.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[1] "R." references are to the Record Appendix in the court of appeals.